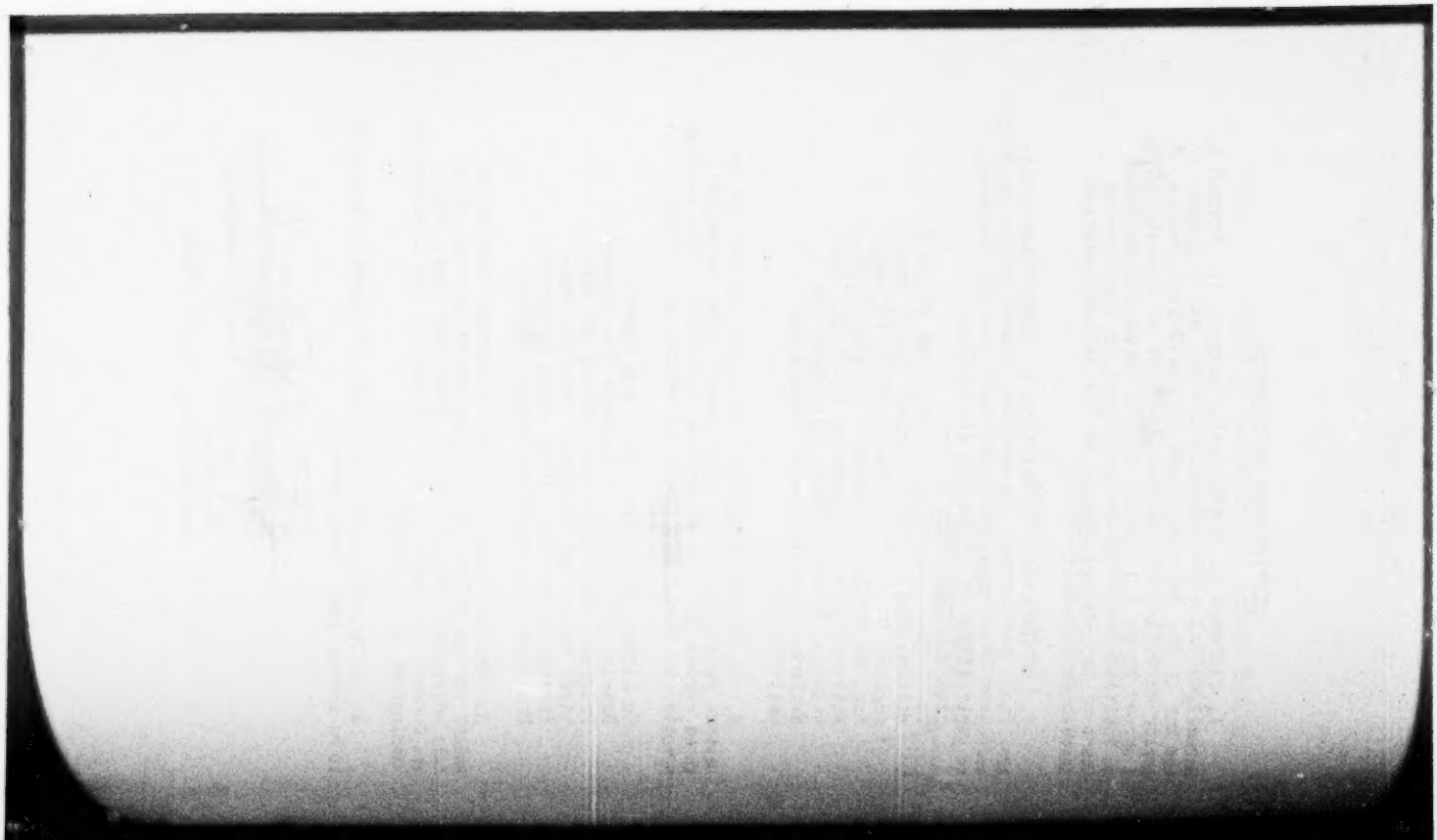


INDEX

	Page
Application of Antitrust Laws	1
Other Assertions of Respondents	3
CONCLUSION	7

TABLE OF AUTHORITIES

Cases

Otis & Co. v. National Association of Securities Dealers, Inc., 84 F. Supp. 395, 399 (D. D. C. 1949)	5
Sherman Gleason & Co., 15 S. E. C. 639 (1944)	5
Silver v. New York Stock Exchange, 373 U.S. 341 (1963)	2, 3

Statutes

Maloney Act

15 U.S.C. Sec. 78o-3(n)	3
(j)(b)(2)-(10), (12)	5

Securities Exchange Act of 1934

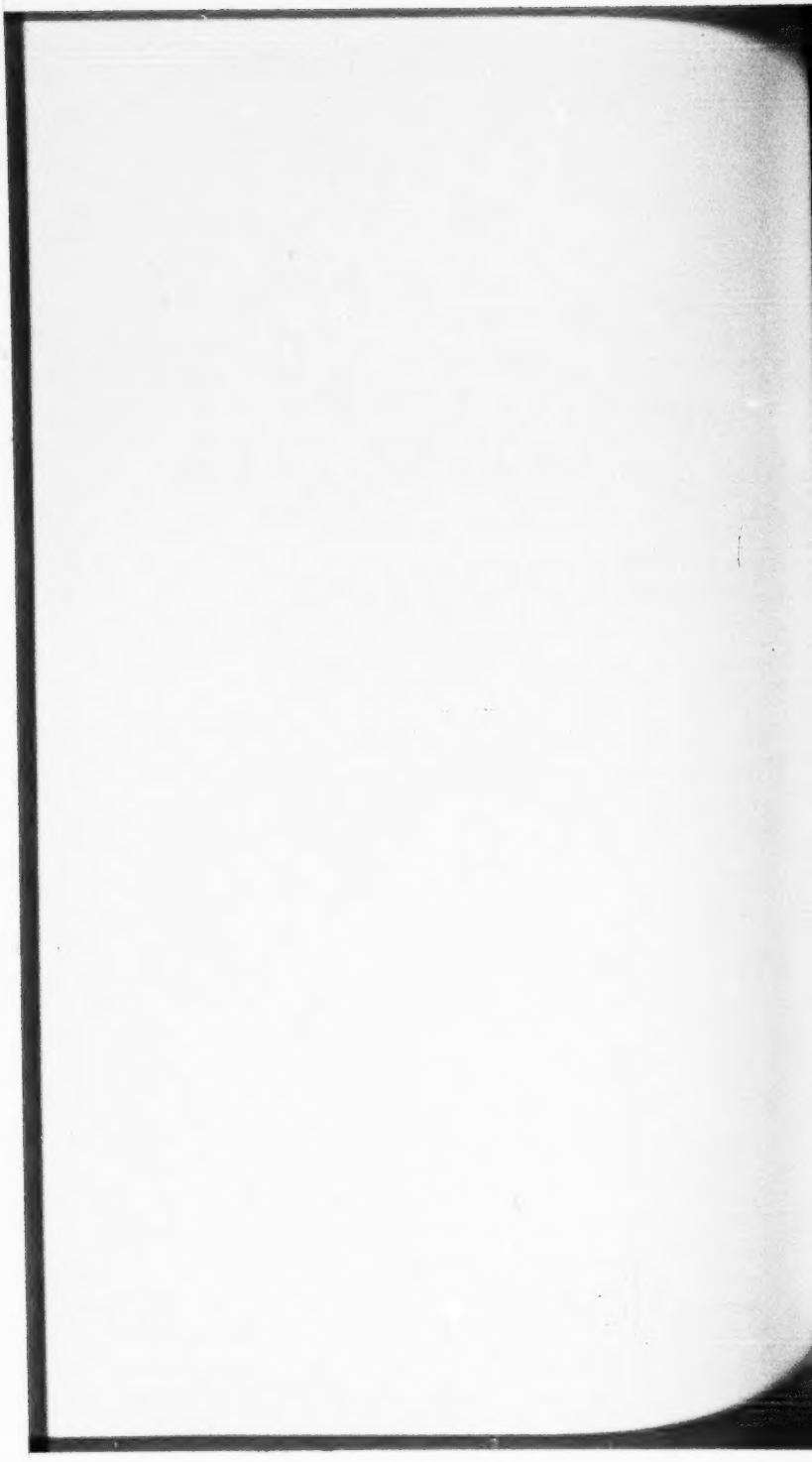
15 U.S.C. Sec. 78o	3

Investment Company Act of 1940

15 U.S.C. Sec. 80a-22	5

Texts

Hearings Before the Subcommittee on Commerce and Finance of the House Committee on Interstate and Foreign Commerce, 91st Cong., 1st Sess., ser. 91-9, at 214 (1969)	6



IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

NO. 72-58

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.
Petitioner

v.

NORMAN L. HARWELL, ET AL

ON PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY TO RESPONSE OF NORMAN L. HARWELL, ET AL TO THE PETITION FOR WRIT OF CERTIORARI FILED BY NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

Application of Antitrust Laws

Respondents' Response to the Petition for Writ of Certiorari filed by the National Association of Securities Dealers, Inc. [hereinafter, NASD or Association], in addition to improperly characterizing certain assertions of Petitioner NASD, emphasizes repeatedly that there are factual issues still to be determined that render the Petition premature at this time. Respondents further urge that the Court of Appeals did not actually decide anything, merely sending the case back to the District Court for a determination of factual issues.

This assertion overlooks the fact that the Court of Appeals established the law of the case at least with respect to the application of the antitrust laws to the facts at hand. The Court of Appeals not only did so, it also improperly stated the applicable law, made a determination inconsistent with this Court's decision in Silver v. New York Stock Exchange, 373 U.S. 341 (1963), and made a pronouncement on the subject which is wholly inconsistent with all prior writings on the subject. See NASD Petition for a Writ of Certiorari, at 14 & n. 4 (July 10, 1972) [hereinafter, Petition]. Even Respondents seem to concede, however, that the Court erred:

> The Court of Appeals stated that the Maloney Act explicity (sic) provides that the Commission is to consider anti-trust effect in connection with the rules of NASD, and cites 15 USC Sec. 78o-3(b)(8). However, upon a careful reading of the cited section of the Maloney Act, it is only provided that the rules of the association were to be designed to prevent fraudulent and manipulative acts and practices and to promote just and equitable principles of trade, etc. But it is respectfully submitted that such section does not, nor does any other section of the Maloney Act, expressly direct that SEC shall have supervision, much less pervasive supervision of the effect of the anti-trust laws upon the rules of NASD. It is very easy to imagine many, many fraudulent and manipulative practices which would in no wise violate anti-trust. This is to say that merely supervision of fraudulent and manipulative practices is not the same as anti-trust. Response of Norman L. Harwell to the NASD Petition for a Writ of Certiorari, at 13 (August 25, 1972) [hereinafter, Response].

Respondents are quite correct in this respect. Nowhere does the Maloney Act expressly provide that the Securities and Exchange Commission is to consider anti-trust effects in passing on the rules of the Association, all of which must be approved by the Commission before they are deemed effective. As previously stated in the Association's Petition, the Court of Appeals has made new law

inconsistent with all prior writings on the subject and effectively amended the statute, acting contrary to this Court's determination in Silver. Petition at 14 & n. 4, 19-26. A correct determination on the relationship of the antitrust laws to the Maloney Act (and hence to the Association) is necessary if there is to be a trial on the merits to determine factual issues.

With respect to the antitrust issue, certain assertions in the Response to our Petition require clarification. The Association does not claim "sweeping antitrust immunization" as Respondents contend. Response at 9, 14. Antitrust immunity is claimed in view of Section 15A(n) [15 U.S.C. Sec. 78o-3(n)] only to the extent that the Association acts within the authority granted it by the Maloney Act. It then follows that the Maloney Act must be looked to, not the antitrust laws, to determine the issue of the NASD's antitrust immunity. If the action taken is within the authority granted, that should be the end of the inquiry.

With respect to Silver, the Association stated in its Petition that it had no quarrel with the holding therein. It contends only that the Fifth Circuit misapplied it. Petition at 19-26.

Other Assertions of Respondents

Respondents assert that the Association's action in adopting its Interpretation destroyed competitive trading in mutual funds and that the Association by its Petition is asking the Court to sanction an "arbitrary and coercive act." Response at 8. They buttress their emotional plea (and that is all it is, an obviously flamboyant statement designed to capture the attention of the Court) by an equally flamboyant statement, totally inconsistent with law, that the Association is monopolistic since all broker/dealers are required to join. Response at 8-9. There is no requirement that any broker/dealer join the Association. In fact, alternative registration provisions are contained in Section 15 of the Securities Exchange Act [15 U.S.C. Sec. 78o] for those who do not care to become members of the NASD. Further, the activity of the Association which is complained of as being "monopolistic" and "coercive" merely stopped

Respondents from gouging profits at the expense of the 100,000 other shareholders of the fund by diluting their interests therein. This dilution is, as stated in the Association's Petition at 8, a simple arithmetical problem and may be illustrated by the following example:

	Withdrawal and Redeposit	
	Before	After
Net asset value	$ 11.00	$ 10.00
Total net assets.....	$550. mill.	$508. mill.
Shares held:		
(a) W & R Group	8. mill.	8.8 mill.
(b) Others	42. mill.	42. mill.
Net assets held:		
(a) W & R Group	$ 88. mill.	$ 88. mill.
(b) Others	$462. mill.	$420. mill.
Percentage of net assets held:		
(a) W & R Group	16.0%	17.3%
(b) Others	84.0%	82.7%

There can be no doubt that this occurs. It is not a disputed fact. Respondents have not disputed it throughout this entire proceeding until they filed their Response herein. To paraphrase Respondents' position, what they seek from this Court is an imprimatur sanctioning their ability to gouge profits from innocent persons who cannot prevent them from so doing. They wish further to have sanctioned a course of activity which is in direct contrast to the terms of the contract pursuant to which they purchased their individual investment programs.

In this latter respect, Respondents' Response repeatedly calls attention to the sales literature used by the sales organization, defendant Growth Programs, Inc., which allegedly emphasized the investors' ability to make "in and out" transactions. At one point, they erroneously and for the first time state that such statements were contained in the prospectus. Response at 6. In point of fact, the prospectuses contained no such language. All prospectuses did contain, however, a contract which had to be signed by

all purchasers (and Respondents do not dispute that all members of the class actually signed one), stating as follows:

> I understand that this is a long term investment not designed for quick profit.

Stated simply, there is no "in and out" privilege. What actually exists is a privilege to withdraw up to 90% of the investment and to reinvest it at a later date at the then net asset value without a sales charge where such is necessitated by a bona fide need or emergency.

Several other misstatements in Respondents' Response deserve mention. At page 14, they stats erroneously (and contrary to specific provisions of the Maloney Act):

> the only authority in the Maloney Act granted to the SEC with reference to rules of the NASD is contained in 15 U.S.C.A. 78o-3(k)(1), et seq.

Aside from the fact that the discussion that follows this statement indicates that Respondents were referring to 15 U.S.C. 78o-3(k)(2), not (k)(1), the basic premise is in error in that several other sections of the Maloney Act give the SEC authority in respect to the Association's rules. See, e.g., 15 U.S.C. 78o-3(j)(b)(2)-(10), (12) (1971); see also Investment Company Act of 1940 Sec. 22, 15 U.S.C. Sec. 80a-22 (1971).

At page 15, Respondents refer to Petitioner NASD as a "trade association." This is an improper characterization. The NASD is a self-regulatory body organized pursuant to an Act of Congress for the purpose of completing the federal regulatory scheme governing the securities industry. As a result, it is an integral part of the overall system of federal regulation of that industry and has quasi-governmental responsibilities, including responsibilities which are quasi-judicial in nature. Otis & Co. v. National Association of Securities Dealers, Inc., 84 F. Supp. 395, 399 (D.D.C. 1949); Sherman Gleason & Co., 15 S.E.C. 639 (1944).

The Association's status as a regulatory, rather

than a trade, organization was very recently emphasized with clarity by the Chairman of the House of Representative's Subcommittee on Commerce and Finance of the Committee on Interstate and Foreign Commerce, the Honorable John E. Moss, in hearings held by that body on February 27, 1969, at which Association representatives testified. He stated as follows at page 214 of the printed record [Hearings Before the Subcommittee on Commerce and Finance of the House Committee on Interstate and Foreign Commerce, 91st Cong., 1st Sess., ser. 91-9, at 214 (1969)]:

> Mr. Moss. If the gentleman will yield further, I think we should place in proper context the type organization NASD is and is expected to be under the Maloney Act.
>
> It is not a trade association. That is specifically disclaimed in the statement that Mr. Sayre gave the committee this morning.
>
> It is not a trade association.

And, further:

> Mr. Moss. Again, I would most respectfully suggest you are getting into an area where we are asking the NASD to respond in the role of a trade association.
>
> NASD is not a trade association, I will remind my colleague from Massachusetts. It is a self-regulatory body, created under the authority of law and it is not supposed to assume the role of a trade association. That is a different type organization, with entirely different objectives. Id. at 217.

Respondents' Response erroneously suggests:

> As a prerequisite of becoming a member of petitioner, each applicant for membership is required to sign a contract with petitioner

waiving any right to sue petitioner for any cause, whereupon the petitioner becomes a "hard nosed taskmaster" holding the whip over all the security dealers in the United States under the guise of requiring fair practice in the securities industry. Response at 7-8.

In addition to this simply being another example of flamboyant prose designed to catch the eye of the Court, it is in error factually and legally -- legally because, as has been shown above, all broker/dealers are not required to join the NASD and factually because there is no prohibition in the referred to contract restricting a member's right to sue the Association for willful malfeasance.

Finally, in several places Respondents allude to an asserted "combined defense" by the Association and the other defendants, Growth Programs, Inc. and Supervised Investors Services, Inc., who were responsible for selling the programs to plaintiffs and who were and are members of the Association. This statement is improper and in error as the Association has from the outset divorced itself from any defense made by the other original defendants, a statement to that effect having been made at the outset of oral argument on Motions for Summary Judgment before the District Court.

CONCLUSION

For the stated reasons, as well as those urged in our Petition for a Writ of Certiorari, it is submitted that certiorari be granted. There can be no proper trial of this cause without a pronouncement by this Court as to the extent, if any, of the applicability of the antitrust laws.

RESPECTFULLY SUBMITTED,

Lloyd J. Derrickson
Frank J. Wilson
Joel H. Pullen

COUNSEL FOR PETITIONER

PROOF OF SERVICE

I, Lloyd J. Derrickson, counsel for the National Association of Securities Dealers, Inc., Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 8th day of September, 1972, I served copies of the foregoing Petitioner's Reply To Response Of Norman L. Harwell, Et Al To The Petition For Writ Of Certiorari Filed By National Association Of Securities Dealers, Inc. on the several parties thereto as follows:

1. On Norman L. Harwell, et al, Respondents, by mailing three copies in duly addressed envelopes, with air mail postage prepaid, to their attorneys of record as follows:

> To Teairl W. Lewis, Esq. and Clarence R. Boatwright, Esq., Attorneys for Norman L. Harwell, et al, at Lewis & Davis, 1215 National Bank of Commerce Building, San Antonio, Texas 78205.

2. On Growth Programs, Inc. and Supervised Investors Services, Inc., appellees below, by mailing three copies in duly addressed envelopes, with air mail postage prepaid, to their attorneys of record, as follows:

> To Lionel R. Fuller, Esq. and James D. Baskin, Jr., Esq., Attorneys for Growth Programs, Inc. and Supervised Investors Services, Inc. below, at Matthews, Nowlin, MacFarlane & Barrett, 1500 Alamo National Building, San Antonio, Texas 78205.

3. On the Securities and Exchange Commission, amicus curiae below, by mailing three copies, in a duly addressed envelope to Walter P. North, its Acting General Counsel, at the offices of the Commission, Washington, D. C. 20549.

It is further certified that all parties required to be served have been served.

_____

Lloyd J. Derrickson